IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1902 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT - Appellant(s)
Versus
DEVJIBHAI MERAMBHAI SANKALIYA - Opponent(s)

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Appearance :
PUBLIC PROSECUTOR for Appellant(s) : 1,
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 27/06/2006

ORAL JUDGMENT

1. The appellant – State of Gujarat preferred this appeal under Section 377 of the Code of Criminal

Procedure; 1973 challenging the quantum of punishment imposed by the learned Additional Sessions Judge, 6th Fast Track Court, Rajkot, in its order dated 11th March, 2004 in Sessions Case No. 18 of 2003 on the ground that looking to the substance seized and its quantity, the punishment imposed is not adequate so as to meet the ends of justice.

2. Shri Patel, learned APP has taken this Court through the evidence on record and especially the opinion of the Expert dated 20th October, 2003, which indicates that the substance in question could be classified to be crude Heroin normally known as Brown Sugar.

3. The appellant has contended that the learned trial Court has not taken into consideration the provisions of Section 22 of the N.D.P.S. Act, provides for the imprisonment of not less than ten years and which may even extend to twenty years. It is also contended that the punishment of rigorous imprisonment of one year and fine of Rs.15,000/- in default thereof rigorous imprisonment for three months being not in consonance with the provisions of Section 22, the same deserves to be enhanced.

4. This Court has perused the record. It is unfortunate that unamended provision of Section 22 have been relied upon for seeking enhancement

of the penalty. The appellant has reproduced the provision of Section 22 of the N.D.P.S. Act, which clearly shows that the unamended Section 22 is sought to be relied upon for seeking enhancement of the penalty imposed upon the respondent. It is evident from the record that the convict – opponent was found in possession of commonly known substance Brown Sugar on 8th September, 2003 at 14.50 hours at Rajkot. The amendment has come into force since 2001 and therefore, the amended provision of Section 22 would be applicable. The amended Section clearly provided that *"where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a terms which may extent to ten years and with fine which may extend to one lakh rupees."* In the instant case, the substance found was not exactly that of Heroin. It was substance containing a part of Heroin as to be seen from the report. The substance found was, therefore, described as crude Heroin. The quantity found was 6 gms and 5 mls, which was higher than the small quantity by one 1 gm and 500 mls only. The discretion exercised by the trial Court seems to have been based upon the quantity found and therefore, it cannot be said that the discretion was wholly misplaced. In fact, the appeal for enhancement is based upon the contention that minimum ten years imprisonment is prescribed under the old

unamended provision of Section 22 was not imposed and therefore, the enhancement is sought. The appeal, thus, is misconceived and therefore, the same deserves to be rejected.

5. This Court (Coram: R.P.Dholakia, J.) in case of Bhanabhai alias Bhagabhai V/s. State of Gujarat in Criminal Appeal No. 1562 of 2004 decided on 5th April, 2005 observed that the trial Court is required to bear in mind the quantity seized while imposing the punishment. In the instant case, the penalty imposed seems to be just and proper and it does not call for any interference under Section 377 of the Code of Criminal Procedure.

6. This Court is of the considered view that the discretion used by the trial Court does not seem to be unjust so as to call for any interference in the present appeal and therefore, the appeal deserves to be rejected as having no merits and accordingly, it is rejected.

(S.R.BRAHMBHATT, J.)

kdc.